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A TRIBUTE TO COMMERCIAL ARBITRATORS

An Editorial

ON MARCH 9, 1960, the thirty-fourth annual meeting of the American Arbitration Association witnessed a ceremony at which twenty-nine commercial arbitrators were cited for their contribution of time and talent to the business community. Each had served, over many years, fifteen or more times in cases arbitrated under AAA commercial rules. Among the arbitrators honored, all of whom had served without fee, were lawyers, accountants, sales executives, credit managers, purchasing agents, bankers and businessmen in a dozen different trades.

Directing the ceremony was the Honorable CHARLES D. BREITEL, Associate Justice of the Appellate Division, New York State Supreme Court, First Department. After a brief address, he handed each arbitrator a suitably inscribed gavel as a gift from the Association. The selection of Judge Breitel to make the presentations was particularly appropriate, for there is no judge friendlier to arbitration nor better qualified to appreciate the effort and skill that go into a judicial decision, regardless of the forum in which it may be rendered.

Judge Breitel pointed out that not every man of intelligence, goodwill and disinterestedness is necessarily a good arbitrator. Personality traits also play an important part. Arbitration is an adversary proceeding, the outcome of which often has serious economic consequences for the parties. The atmosphere may become highly charged, so an arbitrator must be able to listen to the parties, keep firm control of proceedings, and form an opinion uninfluenced by emotion. Although the arbitrators neither sought nor received monetary compensation for hearing and deciding commercial cases, surely it was compensation of another sort for them to hear one so eminently qualified to recognize judicial temperament attest to the fact that they have it to a high degree.

The final paragraphs of Judge Breitel's remarks follow:

> "As far back as in Roman times, and undoubtedly long before that, men have served as voluntary arbitrators to decide disputes among their fellows. This is a great service rendered

outside the formal system, such as the courts, for the determination of disputes. There is a great value in men choosing their own judges when they are able to choose them well. Men such as are being honored today for many decades of uncompensated service in arbitration are really the heroes of this story.

"Those of us who, sitting as judges, serve on a professional basis in the determination of disputes, have many rewards in addition to the great satisfaction that comes from the nature of the service itself. But the men who year in and year out give of their time, their energy, their conscience, and expend themselves in the inevitable anxiety of decision in the field of arbitration, deserve the unlimited gratitude of their fellows."

COMMERCIAL ARBITRATORS HONORED

at the Annual Meeting of the

AMERICAN ARBITRATION ASSOCIATION

March 9, 1960

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ARBITRATION AND THE LAW*

by Carl A. Warns, Jr.

Outstanding among the many blessings of those of us fortunate enough to live in this free land is our wonderful two-fold heritage of the Federal Constitution and the Anglo-American Common Law. Implement it we will by statute and administrative regulation but underlying this maze of superficial detail remain the fundamental guarantees of the individual—the right to a hearing, to be confronted by an accuser, to present evidence in our behalf, and to cross-examine those who testify against us. The general capacity of our courts to weigh and harmonize the constitutionally guaranteed individual rights with the group interests which have naturally developed as our socio-economic structure matured and the continued capacity of those courts to maintain a balance of interests regardless of changing pressures of economics and the political climate is a blessing for which we can be eternally thankful. It is the thesis of this discussion that the growing field of labor arbitration is but a facet of our general judicial system and to the extent that labor arbitration accepts the fundamentals and precepts of natural justice arising from our traditional legal system, the area of industrial settlement of disputes by arbitration will thrive and be accepted. This does not mean, of course, that misplaced technical emphasis is any more desirable in the various aspects of an arbitration case than it would be in the probate of a will or a dispute over a boundary line between neighbors. The point here is that within the broad limits of our judicial system are found principles and techniques which for centuries have proved successful in the adjudication of disputes regardless of their factual content. Those same principles and techniques are applicable in the area of settlement which is called labor arbitration.

Arbitration is generally defined as "the reference of a dispute to one or more impartial persons for final and binding determination."[1]

* This article first appeared in *Temple Law Quarterly,* Volume 32, 1959. We reprint it here with the permission of Temple University.

1. American Arbitration Association, p. 4, *The Lawyer and Arbitration.*

As a process, it is not new. Updegraff and McCoy suggest that arbitration "antedates the establishment of a legal order and antedates, in fact, written history".[2] Arbitration was used extensively under the Roman law, and English references report cases back to 1231.[3] In this country, the earliest known instance of voluntary arbitration occurred in 1865 in a dispute involving the iron puddlers at Pittsburgh. The records do not in fact disclose many labor arbitrations in this country prior to World War I. According to a study made by the Bureau of Labor Statistics, a total of 54 arbitration cases were discovered prior to 1915.[4] Peter Seitz, former General Counsel for the Federal Mediation and Conciliation Service, recalls the days "when John Steelman, as Director of the U.S. Conciliation Service, in about 1940, urged commissioners of the Service to go out and peddle arbitration clauses as Fuller brushes or industrial insurance might be sold. In those days it was a rare contract that had such a clause." Mr. Seitz goes on to say that later "The efforts of the U.S. Conciliation Service were supplemented by those of the National War Labor Board which in its directive orders, required arbitration clauses to be included in contracts of disputants before it."[5] It was the efforts of and experience under the War Labor Board which gave labor arbitration its greatest impetus. Many of the outstanding arbitrators today are "alumni" of the War Labor Board. Since 1956 labor arbitration has increased tremendously and is growing every year. It is impossible to ascertain exactly how many cases are referred to arbitration since the majority of them are private matters with no attempt at reporting. As some indication however, the Federal Mediation and Conciliation Service which furnishes rosters of experienced arbitrators for parties on request, in its Eleventh Annual Report for the Fiscal Year 1958 made this comment in regard to the increase of arbitration: "The largest increase in the history of the Service occurred in the fiscal year ending June 30, 1958. The 2,326 requests received constituted a 38.6 per cent increase over the preceding fiscal year, itself a record year to that time." Arbitration can be related to the judicial process in two ways: (1) the degree to which an agreement to arbitrate future disputes is enforceable in the event that one of the parties changes his mind and (2) the extent to which the arbitrator clothes the hearing itself with

2. 4 Updegraff and McCoy, *Arbitration of Labor Disputes* (1946).
3. *Ibid.*, p. 5.
4. *Labor Arbitration*, Vol. 5, Paragraph 60018, sources cited.
5. Seitz, *Collective Agreements and Arbitration*, Sixth Annual Conference on Labor, New York University, p. 17.

the indicia of a court proceeding, and documents and writes his opinion in the manner of a judge. With regard to the first point, "It is settled at common law that a general agreement, in or collateral to a contract, to submit to final determination by arbitrators the rights and liabilities of the parties with respect to any and all disputes that may thereafter arise under the contract is voidable at will by either party at any time before a valid award is made, and will not be enforced by the courts, because of the rule that private persons cannot, by a contract to arbitrate, oust the jurisdiction of the legally constituted courts".[6] This authority goes on to say "Whether the foregoing rule, which has variously been attributed to early jealousy of the courts concerning the exclusiveness of their jurisdiction and to considerations of public policy, rests on a satisfactory basis has been questioned, but it has been so long settled that the courts are unwilling to disturb it".[7] Actually, it is understandable that the courts would be reluctant to accept a contract to delegate the total responsibility of a traditional judicial function to an unknown third person even though the parties would agree to it. The judge is a public official with responsibility to that public, the source of his authority; he is trained in the interpretation and application of contracts and he personally witnesses the lawsuit where the matter is litigated. In the hearing itself, as a trained, responsible official, he can oversee the trial to insure that the interests of the affected parties are protected—that the jury, if one is involved, is not misled by evidence calculated to blur the legal and factual issues and that counsel is competent. In brief, the court has always accepted the responsibility to insist that a fair trial of all legal matters takes place. If the judge permitted his functions to be delegated to private individuals he could not guarantee a fair trial. It is interesting to note, however, once the arbitration proceeding had been concluded and an award issued, the parties were bound.[8] This is assuming of course, that the hearing was fair, involved no illegality, and all issues submitted to the arbitrator were covered by his award.[9] As arbitration grew in acceptance, and it was evident to the courts that this process evoked no undue interference with normal judicial processes, common law decisions tended to accept even executory contracts to arbitrate; the general rule, however, is still applicable.[10]

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6. Am. Jur., *Arbitration*, Section 31 (1938).
7. *Ibid.*
8. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).
9. 3 Am. Jur., *Arbitration*, Section 31 (1938).
10. Deshon v. Scott, 202 Ky. 575, 260 S.W. 355 (1924).

Arbitration, in addition to its common law origin, has for many years been the object of legislation. This legislation dates back to the Statute of 9 and 10 Wm. III, Chap. 15, providing for the submission to arbitration as a rule of court. The statutory procedure in England was later amplified by the Statute of 52 and 53 Vict., Chap. 49.[11] Today every state in the Union (including Hawaii and Alaska) as well as the District of Columbia and Puerto Rico has some statute relating to arbitration. The South Dakota statute however codifies the common law rule that an agreement to submit a controversy to arbitration cannot be specifically enforced; South Dakota adds however that it is a criminal offense to give or offer a bribe to an arbitrator to influence his decision.[12] The several state statutes vary as to the detail of their provisions pertaining to arbitration and the legal effect. Some grant specific performance of the agreement to arbitrate, others provide that a party may secure a stay of court action brought on any issue which the plaintiff has agreed to arbitrate, and others provide that an agreement to arbitrate is a defense to an action brought for a breach of contract. At the Federal level there is one general statute governing arbitration. In 1925, Congress enacted the United States Arbitration Act which provided for a stay of proceedings in a suit upon an issue referable to arbitration.[13] Although the courts are not in complete agreement, it is suggested that the legislative history of this statute and the better reasoned cases point up the intent that the Arbitration Act is to apply only to commercial and not to labor arbitration.[14] The Railway Labor Act has provisions establishing a form of voluntary arbitration for railroads and airlines.[15] As far as labor arbitration is concerned, with some few exceptions, there is some question as to the practical effect of the various state statutes. From the writer's observation, most arbitrations today are common law without any reference at all to local statutes. The decisions are accepted not as a result of the impact of local law but because the parties realize the effect on the continuing relationship of a refusal to comply with the award. This is not to say that there is no litigation over awards, but relatively few decisions go to court. At the Federal level, a recent significant decision of the Supreme Court interpreting Sec-

11. Annot., 47 L.R.A. 336.
12. SDC § 13.1201.
13. Act of February 12, 1925, 43 Stat. 883, c. 213.
14. International Union of United Furniture Workers v. Colonial Hardware Flooring Co., 168 F.2d 33 (1948). See also Berstein, *The United States Arbitration Act—A Reevaluation*, 3 VILL. L. REV. 125 (1958).
15. 44 Stat. 577, 45 U.S.C.A. §§ 151-163.

tion 301 (a) of the Taft-Hartley Law[16] has aroused considerable interest among those who practice in the field of labor arbitration. This decision was the Textile Workers Union v. Lincoln Mills decided in 1957.[17] The court held that Section 301 (a) of the Labor Management Relations Act does more than provide a forum for a lawsuit between companies and unions in suits involving collective bargaining agreements—it sanctions the enforcement of arbitration clauses in those agreements, and authorizes "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . ." [18] It is not the purpose of this discussion to explore the various possibilities of so-called individual and collective rights to sue under 301 (a) and the impact of Lincoln Mills on those rights. Our point here is that now arbitration clauses can be specifically enforced against reluctant parties in Federal Court under Section 301(a) of the Taft-Hartley Law without regard to diversity of citizenship and the amount in controversy.

A second and highly controversial phase of the relationship of the labor arbitration process to the law lies in the approach of the arbitrator to the hearing and the manner of writing his decision. There is a growing fear among many who are experienced in labor arbitration that the process is growing more "legalistic" and is losing by this legalism its advantage over litigation, that is, its simplicity, its tailor-made decisions designed to cover only the problem in issue, its relative lack of expense, and its quick decisions.[19] The charge now is that arbitrators are following the decisions of the courts by citing cases as "authority", both published arbitration decisions and court rulings, as well as following the traditional canons of construction of contracts. In brief, the complaint is that arbitrators are becoming more like judges. "A frustrating kind of legalism has crept into labor relations because the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation, with all the canons of construction familiar to the law of contract".[20] The parties more and more are relying upon the published cases of the companies who specialize in the loose-leaf services. For example, the Bureau of National

16. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1952). The Taft-Hartley Law is officially known as the Labor Management Relations Act of 1947.
17. 353 U.S. 448 (1957).
18. *Ibid.*
19. *Arbitration Journal*, "Creeping Legalism in Labor Arbitration", Editorial, Vol. 13, No. 3 (1958).
20. Stein, Prof. Emanuel, comments appearing in *Monthly Labor Review*, Vol. 81, No. 8 (August 1958) pp. 866-867.

Affairs, Inc. is now in its thirty-second volume of published arbitration reports. These reports have index-digests and a kind of "key-numbering system" quite familiar to attorneys. And more and more arbitrators are citing in their decisions the cases that the parties themselves present at the hearing and in their briefs. This trend toward the lawyer-like arbitrator, the court-like arbitration hearing, the judge-like decision together with the judicial approval of arbitration clauses at the Federal level and the acceptance of the process in the state courts resulting from the statutes does indeed deserve attention. It was not too many years ago that a company and a union with a "simple" problem of contract interpretation would look around the neighborhood for a "fair-minded" person in whom they both had confidence and ask him to listen and decide the case. Decisions when written were simply stated and they decided the issue. The decisions were generally handed down in a day or two because that was probably the only case the arbitrator had before him. Professionalism as a general practice was yet to appear. But I submit the very nature of the process of collective bargaining and the collective bargaining agreement forces decisions which are more than a ruling for one or the other. It is commonly stated that arbitration is not a substitute for litigation but is in reality an alternative to the strike or lockout. This being true, the arbitrator's decision if it is to convince the union membership and the management that economic force to gain an objective is less desirable than resort to arbitration should do more than decide the case—the arbitrator must *say something* when he explains his ruling intended in part to convince the losing party that his view of the contract was erroneous. The overwhelming majority of arbitration decisions involve interpretation or application of contract terms. In fact, agreements specifically limit the arbitrator to the interpreting process. Many, perhaps most, arbitrations arise because one or the other party fears that unless he resorts to arbitration, a "principle" may be established as a precedent that will be to the disadvantage of the group in future relationships. So the significance of the decision then may lie less in for whom the arbitrator rules than in the clear enunciation of the principle inherent in the problem area which the arbitrator must be perceptive enough to see and to understand. But the principle arises out of or lurks in some way in the broad terms of the contract and the relationship of the parties. It is submitted that unless the arbitrator is experienced in industrial relations or has had some training for this field, many of the significant issues, basic to the relationship of the

parties, may escape him. But does this mean that the fundamentals of fairness and impartiality developed through the years since Magna Carta by lawyers and judges, constantly tested and retested by the courts, contribute nothing to the arbitration process? An analysis of the lawyer's "stare decisis" or reliance on precedent will help. In practice the degree to which the courts rely or indeed the extent to which they can rely on "precedent" depends upon the nature of the case, and the policy of the law in regard to the problem. In commercial transactions involving land and in the transfer of negotiable instruments, there is a strong policy by the courts to protect and to encourage the investor. Our land law extends back hundreds of years and millions of dollars have been invested in reliance upon the principles of law established. For the courts to "upset" precedent here except where overwhelming circumstances require it would run counter to our policies to protect the investor and preserve the integrity of our land titles. In our commercial law generally as in the law of real property, the flow of business transactions is too important to our economy to disturb established rules upon which the parties have relied and have extended credit because the judge might think for the moment an inequity would result if the traditional cases were followed. In the law of contracts the precedent falls into two general categories: (1) substantive, and (2) problems of construction or interpretation. Most of our traditional contract precedents involve commercial transactions —the contracting parties are business men. They are strangers in the sense that they do not work together in a continuing relationship. If a contract term is breached the parties resort to court. Once the decision is rendered, the damages are paid and the litigants go their respective ways. Substantively, a problem may arise over whether an "offer" or an "acceptance" has been made, or whether there is "consideration". Frequently, problems arise in the law of commercial agreements over the meaning of terms and the courts have built up a considerable body of "precedent" of rules of construction which are in reality guideposts to interpretation.[21] So it is clear that "precedent" in the law may range from the vague general rules of construction of contracts which will always yield to other expressions of intention, to the arbitrary rules of law, expressed in their most unyielding form in the law of property. The reason for the varying degree of emphasis upon the expressions of prior courts is a policy matter and in the final analysis is a proved method of reaching a just result. As arbitrators

21. 3 WILLISTON, CONTRACTS, REV. Ed., § 614, *et seq.* (Rev. Ed. 1936).

we are rarely if ever faced with whether a contract exists or whether it has "sufficient consideration". Our problems inevitably are ones of interpretation. What is the nature of our agreement? Is it like a deed transferring land? Is it a contract between two business men each anxious for a monetary profit with the terms of the agreement drafted meticulously by lawyers who have pored over every word to insure the best bargain for the client? The true nature of the collective bargaining agreement is yet to be clearly defined and understood although there is considerable literature on the subject.[22] The labor agreement is divided into two basic parts: (1) the economic phases in which the employee's services are bargained for and sold at a certain price which includes his hourly or incentive rate and fringe benefits and (2) the working rules composed of seniority provisions and the others governing the day to day relationship in the plant. This analysis of the collective agreement is consistent with the social and political reality of life in an industrial plant where the employees have selected a union to assert their bargaining rights. Each plant is a separate community of its own—although it may be one of many plants under one ownership and thus "governed" by some central office in a distant state, the institutional and plant relationships are dependent to a large extent upon the personalities of the leadership of local management and the unions, the history of their relationship, and political problems in and out of the union. Whether the relationship is a new or a mature one, the economic strength of the company in the market place, the educational level of the parties, and the acceptance of the union by the rank and file employees are contributing factors to the total relationship. From this setting the collective agreement emerges. The language selected by the parties may frequently reflect the history of past experiences in given areas and the choice of one word over another in the document may be the result not so much of proper draftsmanship but of suspicion and fear of abuse. Obviously, an ad hoc arbitrator coming into the plant to decide a contractual issue will find little help from the court precedent of deeds, wills and the substantive law of commercial agreements. But limited as he is to the "application and interpretation of the contract" drafted by the parties, the arbitrator, perceptive though he is in sensing the background to the problem, should not and cannot, unless he is to exceed his authority, act like a mediator and through the device of the written arbitra-

22. See most recent article on this subject, Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958).

tion opinion, "tell" the parties what is wrong with their relationship and how to correct it. Of course, he should understand the problem but whatever answer he comes up with must be within the general framework and intent of the contract as a whole. In this aspect of his job, many of the rules of construction developed by the courts of law are of assistance. Professor Williston's authoritative treatise on the law of contracts devotes 177 pages to the interpretation and construction of contract. At the outset, these pages make it quite clear that it does not violate the law of contracts to inquire into established practice, implied understandings and other standards apart from any particular words. Williston says it well:

> The early lawyers dreamed of a 'lawyer's paradise where all words have a fixed precisely ascertained meaning, and where if the writer had been careful, a lawyer having a document referred to him may sit in his chair, inspect the text and answer questions without raising his eyes'. Little is left of this dream at the present day . . .[23]

Professor Cox in a recent article puts the same point bluntly but effectively:

> The notion that ordinary commercial contracts spell out all their obligations is a silly canard. Every contract, whether a typical commercial contract or a labor agreement contains 'an implied covenant of good faith and fair dealing'. One who sells a retail milk business impliedly promises that he will not solicit former customers. A lease of coal lands in exchange for a schedule of royalties implies an obligation to mine the coal diligently.[24]

Professor Williston continues:

> In order to determine the legal meaning of a contract or agreement, a 'standard of interpretation', to use Wigmore's helpful phrase, must first be established—that is the criterion by which the meaning of the language and other manifestations of intention of the parties is to be ascertained. It is useless to talk of the 'meaning' of a contract or agreement unless it is known whose meaning is sought; and this inquiry cannot be disposed of by the answer—the meaning of the parties. The inadequancy of such an answer is obvious. The parties may not have the same intention. *Furthermore, courts, after asserting that what they are seeking is the intention of the parties, generally add that this intention*

23. WILLISTON, *op. cit.* Sec. 614.
24. Cox, *op. cit.*

> *can be proved only by what they say and do.* In other words, it is not the intention of the parties that is material, but the meaning that the court gives to their manifestations. . . . The standard most applicable to a bilateral transaction would seem to be that of reasonable expectation . . . that is, the sense in which the party using the words should reasonably have apprehended that they would be understood by the other party. This is not a mutual standard, nor is it necessarily either the local standard or the individual standard of A and B. (emphasis added)

Still further:

> The general intent so far as it is manifested is more important than particular words, and the court will look beyond the form of the agreement and consider the substantive rights created in determining its legal effect.[25]

Quite frankly, I would find nothing wrong or unduly burdensome to cite portions of the above from Williston if I believed it would be helpful to the parties in understanding why the arbitrator resorted to the practices of the parties as an aid to an interpretation of an ambiguous phrase. Obviously, if the established courts of law resort to extrinsic aids in the construction of ambiguous documents it does not vary the terms of the labor agreement if the arbitrator follows this same practice. And it may be of educational value to the company and the union for the arbitrator to cite appropriate judicial authority to justify his use of "implied covenants". In brief, there are those who present arbitration cases who are not familiar with the justice underlying many of these rules of construction—it is the arbitrator's task and responsibility if he believes that justice is served by following the usual judicial approach in ascertaining the meaning of words, to cite authority for this purpose. This shows the parties that what was done in this case is normal and traditional among the public authorities charged with judicial decision and that what has been done was not the result of the arbitrator's calculated decision to deny management its prerogatives or the union its rights. Properly used then, I believe there are occasions in which it makes the decision more understandable for the arbitrator to show the source of his thinking. Whether we argue against the citation of "authorities" or "precedent" in an arbitration award or not, the current decision as a matter of industrial realities is *precedent* and will remain so unless the parties write its effect out of the next contract or another arbitrator overrules it. The

25. WILLISTON, *op. cit.*, § 617.

arbitration process is part of the grievance machinery of the contract and is one way of vitalizing and effectuating the contract. Those who decry the use of precedent in arbitration must surely be unfamiliar with the internal workings of personnel and industrial relations policies in industry. Every administrator of these policies from top management down the line to the foremen and the union steward realize the importance of uniform application of working rules to all employees. In all fairness, grievants having the same problems should be treated alike, and the lack of such uniform treatment from case to case brings forth the charge of discrimination. Just as grievance settlements at the lower steps become focal points for the settlement of disputes in the future in the interests of time and a stabilized relationship, local arbitration cases become standards for future interpretation. This is what we call in the legal profession, "precedent". As the thousands of arbitration cases are settled every year by arbitrators with increasing experience, it follows that their views should be entitled to study and respect. Accumulated wisdom is respected in other fields—reality tells us it is and will be respected in the field of arbitration. But the arbitrator should be cautious in relying for his decision upon what has happened in other plants under other contracts. The essential operative factors should be the same in both cases—properly viewed, the body of industrial experience that is being rapidly developed should not be ignored by practitioners in this field. Stability, predictability and educational value can be found in what others have done. Of course, no judge worth his salt will cite a case that is not in point; the same thing should be true of an arbitrator.

More generally, there are other doctrines in the law that assist the arbitrator in reaching a fair result. The doctrines of waiver and estoppel, well established in the law, have equal value. These standards are designed to prevent a party to an agreement who has voluntarily relinquished a right from again asserting it and from misleading another to his detriment. There is nothing in a contract itself that suggests the use of these doctrines but they are available in the interests of fair dealings. [26] Arbitrators frequently make use of waiver and estoppel.[27] Another principle of equity and fair dealing which the arbitration process shares with the judiciary is that of "mitigation of damages".[28] Although some arbitrators may not permit an employer

26. *E.g.*, IXL Stores v. Success Markets, 97 PAC 2d 577 (1939).
27. Elkouri, *How Arbitration Works,* 181 (1952).
28. *Ibid.* at pp. 178-179.

to deduct from a back pay award earnings which the employee could have received by a reasonable effort, many of them allow the employer to deduct wages actually earned during the period of wrongful layoff.[29]

In the conduct of a hearing itself, arbitrators as a rule do not follow what is commonly known as the "rules of evidence", but this does not mean that the arbitrator is sacrificing any basic principle of our judiciary system. Rules of evidence are essentially exclusionary standards—they inform the plaintiff and the defendant that in the conduct of the trial certain kinds of evidence cannot be presented. These rules are not for the benefit of the judge but are designed to protect the lay jury from being misled and confused.[30] An arbitrator who is misled and confused by witnesses should never have been selected. But in making his decision, the arbitrator gives weight only to facts of substance and discounts the hearsay, the surmise, and the unsubstantiated. The arbitrator realizes that the process of arbitration itself is on trial in every hearing—that the parties must have continuing confidence that this peaceful means is a fairer and sounder means of resolving disputes than the strike or lockout. It is far more in the interests of justice and industrial peace to allow a witness to express himself in his own way even though he runs afoul of technical rules of evidence and to permit that witness to leave the hearing room fully convinced that he has had his day in court, than to utilize a rule of evidence born of a different time and place with resultant lack of confidence in the arbitrator and the process.[31]

Like a judge, the arbitrator keeps foremost in his mind the objective of a "fair hearing". Like a modern judge the arbitrator must accommodate the group interest of the company and the union with the individual interest of the employee grievant. But it is in a hearing on a discharge case that the arbitration proceeding parallels that of a criminal proceeding. Because of the severity of the offense, arbitrators generally place the burden of proof on the employer.[32] Other doctrines such as double jeopardy, condonation, having the punishment fit the crime, affording the accused the right to meet his accuser are all involved in a discharge proceeding. In the matter of

29. In the Matter of Shakespeare and Shakespeare Products Co., 9 LA 817.
30. WIGMORE EVIDENCE, § 4b (3d Ed. 1940), "*Historically*, the distinction is fundamental, *i.e.*, the common-law rules of evidence grew up exclusively in jury trial, and do not apply 'ex stricto jure' in any tribunal but a jury-court."
31. In the Matter of Continental Paper Co., 16 LAB. ARB. 721 (1952).
32. In the Matter of Swift & Co., 12 LAB. ARB. 108 (1949).

International Harvester Company,[33] the employee committed an offense and was reprimanded. A short time later the same employee was discharged for the same offense. The arbitrator held that this was double jeopardy on the part of the company. Management argued that the defense of double jeopardy could be raised only in criminal proceedings, not in arbitration. The arbitrator disagreed with this and stated:

> It is true that the arbitrator does not sit as a criminal court. Nor does he sit as a law court or as a court of equity. But in deciding cases under the contract he is constantly called upon to apply established principles—doctrines as to burden of proof, admissibility of evidence, the equitable doctrine of laches, principles as to the interpretation of contracts, etc. Though the arbitrator does not sit as a judge in equity, when he applies the doctrine of laches to deny a grievance he is acting as an equity judge would act. When a long established principle, such as protection from double jeopardy is applicable he should apply it even though he is not a criminal court judge. The union has cited decisions where other arbitrators applied the doctrine of jeopardy and this doctrine appears to be quite popular with most arbitrators in general. Further no decisions to the contrary have been cited. I conclude that if the grievant was punished twice for the same offense or offenses the second penalty must be set aside. To sustain it would be contrary to fundamental concepts of justice, and would diminish confidence in arbitration as a process for obtaining justice.

Arbitrators insist that management be definite in assessing punishment. In the matter of Downingtown Iron Works,[34] the employee destroyed company machinery. Management suspended the employee until the equipment was repaired.

The arbitrator held that this kind of variable punishment was not justified. Arbitrators will not accept confessions obtained by duress.[35] In another case the Company pointed out to the arbitrator that they had two witnesses to testify against the grievant but they did not want to reveal the identity of these witnesses to the union for fear that reprisals would be taken against them. The arbitrator held that unless the witnesses were revealed he could not use their

33. 16 LAB. ARB. 616 (1952).
34. 18 LAB. ARB. 680 (1952).
35. In the Matter of Febet Corp., 12 LAB. ARB. 1126 (1949).

testimony in arriving at his decision. He held that the accused has a right to meet his accusers and that the right of cross-examination is basic and cannot be taken away.[36]

Outstanding among the characteristics of our Federal Constitution and the Anglo-American common law is their capacity to adapt to new circumstances and yet retain a basic philosophy that free men should live in a free society. In every industrial plant in the nation where unions have been selected to represent the employees a local industrial society exists with its own system of private law arising from a negotiated local "constitution", called a collective bargaining agreement. This local judicial system administered by arbitrators has in a short time by the arbitrators' adherence to established legal precepts of justice and fair dealing gained acceptability not only by the parties themselves but by many of the wiser judges of the courts of law. These judges realize that in the final analysis it is the people who determine their legal needs—the estimated 15 millions of American workers in industrial plants covered by arbitration clauses and their employers have decided that the process of labor arbitration meets their need for judicial determination more successfully than industrial warfare in the form of strikes or lockouts and more adequately than resort to the formalized court structure. Our Constitution and common law are flexible enough to allow the industrial worker and his employer to establish their own private law and methods of adjudication—and it has worked and will increase in value as the parties and the arbitrator continue to realize the inherent values of our traditional legal system and apply these values to the plant disputes.

36. In the Matter of Lockheed Aircraft Corporation, 13 LAB. ARB. 433 (1950).

INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA

by F. P. Mihm

The Tower of Babel, as depicted in the Genesis record of the Bible, represented one of man's earliest aspirations to enter outer space, insofar as the monumental tower in question was intended to pierce the very heavens themselves. The cooperative effort failed, we are told, principally because the builders did not speak a common language; each conversed in a different tongue. This phenomenon is not so unusual today. The architects of modern multi-lateral conventions and uniform legislation for private international law, and those organizations and groups striving to reach plateaus of universal understanding within the framework of workable arbitration laws and procedures, face a task almost as Herculean as the builders of the Tower of Babel. And their problem is compounded by the very same difficulty—the failure of the various dissident groups and interests to speak the same language, because of their variant racial and legal backgrounds, their different stages of economic development, their many political and social climates and other miscellaneous incompatible issues. That arbitration is a time-honored institution stemming from antiquity has not tempered the fact that its progress throughout the world has been discouragingly slow, and Latin America is not without exception in this regard.

Many of these differences in attitudes attended its early growth and beset its initial practice in Latin America. The ever-present resistance to change, inherent in all conservative thinking, has been the same underlying obstacle here as in other areas. This attitude is entrenched not only in the legal profession itself, which by its very nature has been conservative, but also is found in the courts, in the national legislatures, and in the political thinking of the various states. Each vested interest strives jealously to protect its own traditional heritage with an unawareness of the total situation.

Another obstacle has been of an economic-political nature. The Latin American Republics have always been reluctant to become involved in any international trade commitments, since under such agreements they might find themselves at a disadvantage to economically more powerful nations.

Still another problem and one not necessarily limited to Latin America, has been the frustrating and needless concern to harness arbitration machinery with judicial concepts and procedures.

Possible Future Role of Latin America

Yet, despite these difficulties, Latin America offers the greatest opportunity for success in the field of international commercial arbitration because of a very simple well-known device. The strategy used in unraveling any complex puzzle is to break it down into its component parts—for after solving each of them one at a time, it is much easier to then reconcile them individually to each other and finally, to the whole. When one examines the gigantic task facing those seeking to reach world-wide agreement, confronted as they are with the tremendous diversity of national, legal, political and economic systems, it would appear that the most promising results might be achieved in regional areas where there are fewer of such obstacles. There is no area offering greater possibility to achieve such unanimity than Latin America, where the economic, language and legal backgrounds are commonly shared. Here the great barrier to the development of international trade in general and to international commercial arbitration in particular, in the complexity and variety of national legal systems, is non-existent.

On par with the interest in the development of its natural resources, Latin America has been extremely desirous to expand its international trade. The prosperity of any nation is commensurate with the effective free course of goods and services across its borders. Any obstacle to its international trade can only result in decreased productivity and a lower standard of living. This hard economic lesson is even finally appreciated by the most conservative advocates of the high protective tariff in the United States. The more intercourse of trade between nations, the more opportunity there is for the use of arbitration. While economic integration is proceeding at a very rapid pace in Europe in the establishment of free trade areas and the amount of international transactions multiplying at a staggering rate, Latin America in this regard is somewhat lagging behind the rest of

the world. The countries of Asia and the Far East, for example, are evincing at present a much greater interest in the subject of arbitration than is Latin America.

Role of Private Initiative

Private initiative, the great mainspring of inspired action, has done much to advance the cause of arbitration throughout the world through the persistent and tireless efforts of such organizations, of which the American Arbitration Association, the Inter-American Commercial Arbitration Commission,[1] and the International Chamber of Commerce[2] are so effective. As a result, a satisfactory system of arbitration has been set up in Latin America. Much work yet remains to be done, however, in the improvement of arbitration methods, standardization of arbitration clauses, the drafting of more efficient rules and procedures and the promotion of uniform arbitration laws.

The role of private initiative in Latin America is typified by the example set by Ecuador. In an executive decree of December 14, 1948, there is now required the inclusion of a standard arbitration clause in all import and export agreements arranged through the Central Bank of Ecuador. This agreement affects all or any agreements between foreign and Ecuadorian firms.[3]

Uniform Legislation

Because of the many attending difficulties in achieving international agreement through multi-lateral conventions which not always arise from the complexities of legal concepts but even at times from the variances in political climate,[4] the role of uniform legislation ap-

1. The activities of this Commission date back to 1915 at the first Pan American Financial Conference held at Washington, D.C., when the establishment of a system of inter-American arbitration for commercial disputes was first recommended.
2. The International Chamber of Commerce, since its foundation in 1919, has been active in the development of international commercial arbitration.
3. Decree No. 468, of December 14, 1948, Registro Oficial No. 106, p. 840. Ecuador also stands apart from all other Latin American countries in that its requirements for the enforcement of foreign judgments are fewest in number (excepting the Dominican Republic, whose code is silent on the subject). Foreign judgments are recognized in Ecuador providing they do not violate Ecuadorian public policy. Apart from this there are two basic requirements: first, that it be a final judgment rendered in accordance with the laws of the country of origin, and second, that it be rendered in an action in personam.
4. For example, as reflected in the attitude of the United States where the

pears to be a most promising one. This is especially true of Latin America, where the provisions governing arbitration are incorporated in each country's Code of Civil Procedure. Many of these provisions are identical.

Where such countries of common national and racial origin, such as the Latin American Republics, are further bound together by a common geographical area, it is not surprising that Antonio de Bustamante's effort to write a unified code of private international law in 1928 was fairly successful. It is hoped that the present task of the Inter-American Juridical Committee of the Organization of American States in the revision of this code will have an even more far-reaching effect in making it acceptable to a greater number of states.

The main object of private international arbitration is the recognition of arbitration agreements, and inherent in this recognition is the enforcement of foreign arbitral awards. If there is any area of doubt in the field of arbitration, it lies not in the lack of willingness of the parties to arbitrate but in the uncertainty of enforcement of awards. It is felt that the number of arbitration clauses in commercial contracts between corporations of different nationalities would be much greater if there were less uncertainty of enforcement. With one uniform code governing recognition and enforcement, there would be no cause for doubtful speculation on this subject. Particularly would be eliminated difficulties in Argentina and Mexico where each individual province also has its own separate Code of Civil Procedure, each one differing slightly from the other.[5] The legal requirements to enforce foreign arbitral awards vary greatly from country to country and there is much ambiguity as to what is actually demanded. For example, most of the Latin American courts look for some sign of authenticity which is not always clearly defined. The Chilean Code states that the authenticity of foreign arbitral decisions shall be established by some sign of approbation from the courts of the country in which the decision was rendered. Amando Uribe Herrera, a Chilean writer on the subject, remarks: "This requirement is most logical since even awards rendered in Chile by domestic arbitrators, before they may be executed, have to be approved by the judge, due to the fact that the difference between arbitrators and

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United States Senate has been traditionally hesitant in committing itself in treaties of this type.

5. Argentina pointed out this distinction in a reservation to the Draft Uniform Law on Inter-American Commercial Arbitration submitted by the Inter-American Juridical Committee February 1, 1956, to be later discussed.

judges is that the former lack the power to execute their own decisions."[6]

It is almost obligatory, therefore, to first obtain a judgment on the award in the country of origin before seeking its execution in Latin America, and this despite the fact that no real distinction is made between an award and a judgment. To the Latin American mind, however, the judgment is more official in character and demonstrates satisfactory compliance with domestic legal requirements. In Brazil, this is tantamount to their own procedure known as homologation. As stressed by the Brazilian writer Amilcar de Castro,[7] when the Civil Code speaks of foreign courts it means courts with jurisdiction and power for administering justice in the name of the government. "And if a judgment can be judicially executed in that country there is no reason why it should not be executed outside the country, even if it were rendered originally in a private jurisdiction. As to awards, there is still much debate as to their juridical nature and the dominant opinion is that the arbitrators do not have jurisdiction although they do have certain power, and the award has certain judicial import, but only with homologation by the court is the award given real judicial character." An award duly homologated by the country of origin would, in the eyes of a Brazilian court, be one where an award was first reduced to judgment. Another advantage of this precaution is that it offsets the distinction, not prevailing in some countries, such as the United States, between a de jure arbitrator and a de facto arbitrator.

The Colombian Code provides for this element of authenticity in a somewhat different manner. It stipulates that all types of instruments and private documents rendered in a foreign country to be used in Colombia be authenticated in the country of origin by their consular or diplomatic agent, or, in their absence, by the consul or agent of a friendly country. When this is done, there is a presumption that said instruments or documents comply with the law of the place where they originated. The Honduras and Panama codes contain similar provisions.

Likewise, the procedural requirements of the various Latin American countries differ greatly as to jurisdiction, formal examina-

6. Translated from his book entitled "De la Ejucucion de las Sentencias" (Santiago).
7. Translated from his book entitled "Das Execucoes de Sentencas Estrengeires no Brazil" (Rio de Janeiro).

tion of the award as to authenticity, legality, validity and finality, as to the translation of the documents, as to time to answer and as to the defences that might be set up by the defendant.

The goal sought to be achieved in the drafting of uniform legislation to cope with the problem of recognition and standard procedural remedies for the enforcement of awards, is that an absolute criterion be established which is not vague and not capable of divergent interpretation—and yet one that insures the complete confidence of both jurists and business men. The second draft of the Inter-American Juridical Committee of the Organization of the American States, of February 1, 1956, represents a notable effort in this direction. This draft of uniform law establishes the compulsory force of the award, making it tantamount to a domestic judgment. It recommended only six grounds on which opposition to the enforcement of the award might be resorted to, most of them having to do with validity, finality and regularity of the arbitration proceedings and the award resulting therefrom.[8]

What international conventions have failed to achieve because of political and legal exigencies, may perhaps be achieved by uniform legislation adopted by individual states.

Multi-Lateral and Bi-Lateral Treaties

Discouraging as the monumental task may be in achieving any sort of agreement through multi-lateral conventions on the unification and interpretation of pertinent laws and regulatory procedures of the various states pertaining to international commercial arbitration, Latin America, because of its common racial and legal background, might very well become the key to international progress even in this field.

Early in 1888, the Montevideo Treaty[9] had a great unifying effect in this direction. It was the first influential treaty of its type providing for recognition and enforcement of arbitration agreements. This treaty was ratified by some Latin American countries and is particularly significant in that it obviated the necessity of the recipro-

8. Cp. the Report of the Special Committee on International Commercial Arbitration of the Inter-American Bar Association, of March 20, 1959, 14 Arb. J. 141 (1959).

9. February 13, 1889, ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay; see Vincente Vita, "Comparative Study of American Legislation Governing Commercial Arbitration" (Inter-American High Commission, U.S. Section, Washington, D.C., 1928) p. 59, and Martin Domke, "Inter-American Commercial Arbitration," 4 Miami Law Review 425 (1956).

city with its many shades of interpretation and involved questions of burden of proof.

Reciprocity[10] is deeply engrained into the legal thinking of Latin America, largely due to the strong influence of their Spanish law origin. This question of burden of proof on the subject of reciprocity is a rather moot one and most of the countries involved do not clearly enunciate its implication. Peru is one of the exceptions, however, for in Article 1162 of the Peruvian Code of Civil Procedure, the plaintiff bears the burden of proof. In the case of Cuba, the burden of proof is also upon the plaintiff to demonstrate that in the country where the award was given, Cuban judgments are in fact enforced under similar circumstances or, in the absence of this, the plaintiff must at least show that, according to the laws and the decisions of the country where the award was made, the execution of such judgments is not prohibited. Venezuela also places the burden of proof upon the plaintiff who must show by "a valid document" that Venezuelan judgments are executed in the country of the plaintiff, and that they are executed without any question as to the merits of the case.

Of even greater importance and scope of influence than the Montevideo Treaty of 1888 is the Pan American Code of Private International Law generally referred to as the "Bustamante Code."[11] Few of the multi-lateral conventions of this type have met with this degree of success, and again chiefly because of the common interest which the signatories felt as a regional group.

This Code fully covers the subject of enforcement from many broad aspects and yet its requirements are notably few from the standpoint of unnecessary legal encumbrances—and without conflicting with the sovereignty of the signatory states. Very simply stated, they are: judgments must have been legal in the initiating country

10. Chile, Cuba, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela have provisions in their Civil Codes calling for positive reciprocity whereby is meant an obligation to give to foreign decrees the same treatment that its own judgments are given in the other country. Chile, Colombia, Cuba, Guatemala, Mexico, Nicaragua, Panama, Peru, Uruguay and Venezuela adhere to the concept of negative reciprocity, which provides that, unless there is actual reciprocal treatment given in the country of origin, such judgments will not be enforced. Actually, there is very little difference between either type. This is another example of rather needless legal complication.

11. The Bustamante Code of 1928 is in force in Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. See Vincente Vita, supra n. 9.

and rendered under competent judicial authority with proper service to the parties or their legal representatives. These facts must be properly documented in order to establish their authenticity. They must be presented officially translated if the language should be different; naturally, the procedural laws of the forum prevail. All parties are given ample opportunity to be heard, including the Government Attorney.[12] An appeal is provided for in the same manner as domestic decisions. While all of the above pertain to foreign judgments, Article 423 of the Bustamante Code brings arbitral awards within the same provisional framework as foreign judgments.

Bi-lateral treaties have an obvious advantage over multi-lateral treaties in that the issues are less complex. The United States has concluded a number of treaties of Friendship, Commerce and Navigation, containing favorable clauses for the recognition and enforcement of arbitration agreements, and one such with Colombia. Unfortunately, the United States withdrew the latter from further consideration by the Senate.

United Nations Effort

The United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958,[13] is another multilateral convention attempt to develop an acceptable set of uniform rules on international commercial arbitration. The conference at the outset recognized the fact that a private agreement to arbitrate should be recognized by all countries that become parties to the Convention and that the party judged to have won an arbitral proceeding should not be thereafter blocked by legal devices from obtaining the enforcement of the award. Previous international agreements on this subject, notably the Geneva Protocol of 1923 and the Geneva Convention of 1927 under the auspices of the League of Nations, have long been out-moded. One of the major changes made in the present convention was the expansion of the number of types of arbitral awards to include those from all permanent arbitral bodies. One of its articles also covers the important provision of reciprocity.

Article 5 provides seven specific grounds on which the recogni-

12. The function of the Government Attorney is similar to that of the Attorney General of some states or in some cases to that of the District Attorney (e.g. in the United States).
13. U.N. Document E/Conf. 26/g/Rev. 1, of June 10, 1958; text also in 13 Arb. J. 107 (1958) and 53 Am. J. Int. Law 420 (1959).

tion and enforcement of an award may be refused, mostly dealing with the regularity and validity of the proceedings. These grounds for refusal include the incapacity of the parties or invalidity of the agreement, improper notification of the parties of appointment of arbitrators or of the arbitral proceedings or any other condition preventing a proper presentation of the case by one of the parties, irrelevancy of the subject matter or scope of the arbitral proceedings, illegality of the arbitral proceeding or improper composition of the arbitral authority, lack of finality of the award or one involving a subject matter not possible to be arbitrated in the country of enforcement, and where the recognition and enforcement would be contrary to the public policy of that country. It is immediately recognized that this, like any similar multi-lateral convention effort, is an attempt to reconcile the ends of international trade, while, at the same time, preserving the judicial prerogatives of the individual states. As of December 31, 1958, only El Salvador, Costa Rica, Ecuador and Argentina have signed the Convention (the latter two with reservation). It is yet to be seen how many Latin American countries will ratify it. It is too early to tell how effective this Convention will be in facilitating the ends of international commercial arbitration. That it was a tremendous improvement over the Geneva Convention is acclaimed by many, in that it provided for a wider definition of awards, in its reduced and simplified requirements, in the placing of the burden of proof upon the party against whom recognition or enforcement is invoked, in that it gave the parties greater freedom of choice in arbitral authority and procedure and in the demand for suitable security from the party opposing enforcement.[14]

Conclusion

Much lip service has been given to commercial arbitration as the most acceptable procedure in dealing with international commercial disputes. What is sometimes not realized, is that there is no presently known alternative to arbitration. Without arbitration there is no other remedy. The phenomenon of the shrinking world in which we live with its miraculous advances in communication, science and technology in general, is making its impact on every order of our civilization. The entire character of the world has been altered by

14. Cp. the articles on the Convention by Martin Domke, 53 Am. J. Int. L. 414 (1959), Allen Sultan, ibid. 807, Paolo Contini, 8 Am. J. Comp. L. 283 (1959), and Samuel Pisar, 33 Southern Cal. L. Rev. 14 (1959).

these revolutionary changes, some of which are political, such as the emergence of new nations, some economic due to the increased co-operation between states and accelerated governmental activity in international trade, while still others are technical in the late advances of scientific achievement. Today business can be transacted all over the world in much the same way as it previously had been possible within the confines of one country. Latin America cannot afford to lag behind the rest of the world in this important field. As old an institution as arbitration is, it has not kept pace with the phenomenal progress of our modern day.

The increasing number of international trade transactions make obligatory a flexible, simple system of recognition of arbitration agreements and enforcement of awards. Continued progress in this field demands further freedom of the parties to assume contractual obligations and the recognition of such rights by foreign states. As long as there is international trade, business disputes are inevitable. Greater uniformity of national laws on arbitration would further the efficacy of the settlement of private law disputes. Arbitration is developing, and will develop, and Latin America with its history of love of justice and desire to assume its rightful role in the field of international trade, may contribute much in its development between the businessmen of the trading nations of the world.

IN SEARCH OF A THEORY OF ARBITRATION

by Josef P. Sirefman

Part I

Despite recent events which have tended to broaden its scope, commercial arbitration has had only limited growth in the United States. Surveyors of the present scene may offer as refutation of the foregoing assertion a series of interesting developments: United States participation in a United Nations Convention On The Enforcement of Arbitral Awards,[1] adoption of the Uniform Arbitration Act by several states,[2] relief normally outside the ken of the courts has been confirmed when granted by an arbitrator,[3] the arbitration clause has been held to be severable from the main contract and to cover fraud in the inducement,[4] to name but a few. And yet the feeling persists that these developments are not the result of a recognizable growth trend but are rather a series of disconnected occurrences achieved within the framework of the ordinary courts, without any substantial recognition of arbitration as an independent, autonomous system for the settlement of disputes.

A fundamental premise of this note is that a definite correlation exists between the courts' attitude and arbitration's limited growth. To those who measure arbitration's success by the yardstick of court acceptance the premise may seem invalid. In the long run, however, such measurements are irrelevant to the theory of arbitration and to the practice of arbitration itself; for such intense emphasis on court

1. Domke, The United Nations Conference on International Commercial Arbitration, 53 American Journal of International Law 414 (1959).
2. Laws of Florida, General Laws 1957, Chapter 57-402; Minnesota Sess. Laws 1957, Chapter 633 Sections 1 to 24.
3. Ruppert v. International Brotherhood of Teamsters, 3 N.Y. 2d 576, 170 N.Y.S. 2d 785 (1958); Staklinski v. Pyramid Electric Company, 6 N.Y. 2d 159, 188 N.Y.S. 2d 541 (1959).
4. Robert Lawrence Co. Inc., v. Devonshire Fabrics, Inc., 271 F.2d 402 (Second Circ. 1959).

acceptance underscores a glaring failure to develop a positive theory, one which does not seek to emulate the ordinary courts but which provides an alternative, to the business community, which is wholly outside the courts. Arbitration today may be likened to a large fertile field, intensely developed along one thin edge of court acceptance, but curiously untended and uncultivated throughout the remainder.

This feeling that a critical element is missing is not new. Professor Kenneth Carlston, for example, sensed some time ago that unless the basic facts of arbitration are realized, "the full social potentialities of the arbitration process will not be achieved."[5] Some of this uneasiness may, no doubt, be due to a built-in preoccupation with theory. It is, however, submitted that insufficient attention has been directed towards the resolution of the following questions: Is arbitration a separate and distinct system possessed of a raison d'etre without reference to ordinary courts or statute law? Should its processes be subjected to a different type of analysis than that employed in ordinary court situations? Is arbitration merely summary equity proceedings, i.e., solely a matter of technique, or does it have a theoretical foundation coupled with an atmosphere of decision making which is at variance (alternative) with that of the ordinary courts?

In order to understand arbitration's preoccupation with the ordinary courts a historical perspective of the common law is necessary. The most salient political feature of the common law has been its ability to assimilate the invasions of other systems and yet retain its dominance. One might compare it with an ancient China whose vast populations and cultural strength literally absorbed and negated "successful" invasions. Pound observes that, "From the beginnings, it has been in competition, if not in conflict, with other systems, and it has steadily gained ground."[6] He catalogues its resistance to or absorption of the canon law, Roman law, the supremacy of the Crown, foreign law, the law merchant, various law reform movements, the Napoleonic Code, probate, administration and divorce, equity and equity procedure. The final result has been the supremacy of the law. "Not only has the Common Law as a system successfully resisted all attempts to bring in some other law in its place, but in those parts of our system where alien and more flexible methods have existed or

5. Carlston, Theory of the Arbitration Process, 17 Law & Contemporary Problems 631 (1952).
6. Pound, Do We Need A Philosophy Of Law?, in Jurisprudence In Action p. 393 (Baker Voorhis & Co. Inc., 1953).

have arisen in contravention of the fundamental theory of the Common Law that litigation is contentious, and where arbitrary discretion has obtained serious foothold the Common Law ultimately has prevailed."[7]

Possessing this historical perspective one would be inclined to say that the "struggle" has long since ceased and the ordinary courts exercise supremacy over arbitration. Lord Parker, in tracing the history of English Arbitration Acts, discovered that the early statutes did not curb the arbitrator's powers, and reported:

> "The breadth of the arbitrator's power is readily apparent from this statement of the law: the sole curbs going only to securing action within the submission, preventing awards ordering acts, which are *mala in se* or *mala prohibita,* and modifying awards ordering performance inconsistent with judicial judgments. Otherwise the arbitrator is free, indeed his power is larger than the power of any ordinary judge according to the compromise, after his own mind, as well of the fact as the law, not observing the form of the law. It is only as the eighteenth century passes that judicial intervention into arbitration begins to extend."[8]

The extent and intensity of that intervention is apparent today in the control ultimately exercised by the courts in applying and interpreting the arbitration statutes. Indeed, absorption has been so complete that arbitration has been defined as a "judicial proceeding" and in some cases a "special proceeding" all within the aegis of the ordinary courts.[9]

Lord Parker believes that this control was the price exacted by the judiciary when their aid was enlisted to enforce agreements to arbitrate. What the precise terms of this "bargain" were is now only of historical interest. However, the judicial attitude towards the proceedings is critical, i.e., the way in which the courts see themselves vis-a-vis an arbitration proceeding. "The arbitrator here does not grant an injunction. The court does, upon facts found by a tribunal without equity jurisdiction," said one court upon being called to con-

7. *Ibid.*
8. Lord Parker, The History & Development of Commercial Arbitration (Jerusalem, 1959).
9. An interesting discussion of the meaning of such characterization is contained in Abrams, Arbitration, Courts and Coporate Problems, 9 Arb. J. 120 (1954).

firm an award granting injunctive relief.[10] In another case it was held that "the court, in formulating a suitable judgment, which follows precedent, does not surrender its equitable jurisdiction. The court will not render a decree which shocks good conscience or is otherwise offensive to equity."[11] But does the conclusion that the courts exercise ultimate control end our problem?

That the ultimate sanction belongs to the ordinary courts under the characterization of summary equity or judicial proceedings testifies to the political power and success of the common law system. But such characterization does not ipso facto invalidate the concept of arbitration as an alternative self-sufficient system. It simply means that, to a great extent, the ordinary courts, when first faced with the problem, analyzed arbitration using the vocabulary of their own system and, when subsequently called upon to define and redefine its nature, resorted to tautology. The courts themselves have not been completely comfortable with their characterization. Indeed, the ghost of a vaguely sensed autonomous system haunts many an opinion.

But court sanctions and court acceptance constitute only a limited area of the arbitration field. What remains is the neglected task of deriving an independent frame of reference for arbitration.

How shall we approach the derivation of such a theory? There do not exist a sufficient number of verifiable generalities with which to construct a theoretical model uniformly applicable. This lack may demonstrate arbitration's historical adaptability as a remedy. Perhaps it illustrates the confusion attendant upon giving one name to a series of different processes. It may also mean that under the dominance of the common law and its concomitant court acceptance arbitration has been remolded beyond its plastic limits (i.e., its emergence as an adjunct of the courts).

Whatever the reason the absence of such a structure means that we must search in another direction. This direction should be toward the nature of the dispute. In this respect labor arbitration is pertinent for it illustrates what can be termed the *grievance* or *gap* theory of arbitration. The gravamen of this theory is that arbitration is best suited to handle disputes (grievances) for which there is no adequate remedy either at law or in equity (gaps). Labor arbitration has filled such a void.[12] The future role of commercial arbitration lies in the

10. In re Albert, 160 Misc. 237, 288 NYS 933 (1936).
11. Young v. Deschler, New York Law Journal, Feb. 20, 1952, p. 699.
12. Prof. Carlston in his article on Theory of the Arbitration Process, cited in note 5, supra, interestingly enough devotes the vast majority of his essay

elimination of dispute gaps in quotidian economic activities.

There are those who approach the problem by way of uniform laws and treaties.[12] This is particularly true in the international field where the emphasis is on the elimination of inflexible sovereign power over private contracts. In this connection one of the major concerns is centered upon the imponderable role of substantive law in the arbitral process, and upon how to give expression effectively to its substance in treaties and uniform legislation. These international "considerations" are of course salutary. But they do not deal directly with our theory question. Indeed, they are but extensions of ordinary domestic court acceptance upon international trade.

With the possible exception of public policy ramifications these developments ignore the grievance theory entirely. If, however, there is no adequate remedy in law or equity within the confines of any legal system and arbitration, in the eyes of the business community, does not fill the gap, then issues of substantive law for court acceptance purposes, whether domestic or foreign, seem to be moot.

Part II

The remainder of this note will be devoted to a critical examination of some commonplace observations concerning the arbitral process. These observations will be approached from the grievance side, i.e., the principal concern will always be on the nature of the dispute.

A—All phases of the arbitration process, from the inclusion of the future disputes clause in the contract to the rendering of the award, take place literally and figuratively outside the ordinary courts.

Most arbitrations are administered by private organizations; the details of the proceeding are controlled by the arbitrator; contacts with the ordinary courts are intermittent, post facto, and summary. At the risk of seeming repetitious this observation implies doubt as to whether a positive theory of arbitration "outsideness" can be derived from a reading of court opinions dealing with problems which arose in other arbitrations. The frame of reference found therein is often

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to the history of labor arbitration, and comparatively few paragraphs to the commercial aspect. One might adduce from this treatment that commercial arbitration's gap filling theories are yet to come.

13. A compilation of problems in this area are listed in Crane, Arbitral Freedom From Substantive Law, 14 Arb. J. 163 (1959).

antithetical, at best unclear and necessarily limited by the statute law which is applied.

Emphasis on court acceptance brings to mind the story related by Erich Heller of a routine in which a famous clown appeared on a stage which was completely dark except for a small circle of light cast by a street lamp in one corner. The clown with his long-drawn and deeply worried face, walks round and round this circle of light, desperately looking for something.

"What have you lost?" a policeman asks who has entered upon the scene.

"The key to my house."

Upon which the policeman joins him in his search. They find nothing, and after a while the policeman inquires: "Are you sure you lost it here?"

"No," says the clown, and pointing to a dark corner of the stage, "Over there."

"Then why on earth are you looking for it here?"

"There is no light over there."[14]

The key to the further cultivation of the arbitral process will not be found under the light cast by the ordinary courts.

B—Decision making requires the application of substantive principles, but precedent is not always relevant in arbitration.

The predictability which legal folklore ascribes to the use of *stare decisis* is not involved here. Predictability of result is at best precarious in any forum. We are concerned with the arbitrator's *ratio decidendi* and whether the arbitration process creates principles of law and applies standards of conduct. Pound conceives a standard as

> "certain limits of conduct from which one subject to the standard departs at peril of liability or of the invalidity of what he does. The chief characteristic of a standard is that it is not to be applied absolutely like a rule, but is to be applied according to the circumstances of each case. Examples are: The standard of due care not to cast an unreasonable risk of injury on others, exacted wherever anyone is carrying on some course of conduct; the standard of fair conduct exacted of all who stand in a relation of trust and confidence; the standard of reasonable service

14. Erich Heller, Oswald Spengler and the Predicament of the Historical Imagination in The Disinherited Mind, Farrar, Straus and Cudahy (1957).

and reasonable facilities exacted of public utilities. Standards are the chief reliance of modern law for individualization of application, and are coming to be applied to conduct and conduct of enterprises over a wide domain."[15]

The arbitrator also applies standards in an individual way "according to the circumstances in each case." But there is this dissimilarity: Pound's standards are part of a great articulated body of laws, rules and sub-rules while the arbitrator's standards are ad hoc, essentially ephemeral in comparison with the detailed body of law, and seemingly voiceless, particularly where the award is rendered without opinion.

". . . . Where does the judge find the law which he embodies in his judgment," asks Cardozo. He then answers:

"there are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no further. The correspondence ascertained, his duty to obey. The constitution overrides a statute but a statute if consistent with the constitution overrides the law of judges. In this sense, judgemade law is secondary and subordinate to the law that is made by the legislators."[16]

The Judge's role is to fill in the gaps in the statute in the light of legislative intent, to the extent that it is ascertainable. When there is no legislative expression, there is resort to the common law and to the principles of *stare decisis.*

Where does the arbitrator find his law? Certainly the claim to custom and usage is not unique with arbitration, for as Cardozo sees it, the courts do not overlook custom. Indeed, "the constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong. A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct; the mores of the time."[17] Moreover recognition by the law is not vague and general, for he continues: "Life casts the moulds of conduct which will someday become fixed as law. Law preserves the moulds, which have taken form and shape from life."

15. Pound, What is Law?, in The Task of Law p. 46.
16. Cardozo, The Nature of the Judicial Process (Yale University Press 1921) p. 14.
17. *Ibid,* p. 63.

Let us take this one step further. Kelsen tells us that there are two ways of creating law—custom and legislation.[18] Does the arbitrator create law? Does he apply it? Does he legislate? Or does he engage in all three operations when he arbitrates?

It may seem a bit startling that after having positively stated that the derivation of arbitration theory cannot come from a study of the cases, so much weight is then put upon the ideas of legal philosophers whose raw material is culled from ordinary court experience. What seems to have developed is a Pandora's box of theoretical problems. The strongest impulse is to tuck the problems neatly back into the box, close the lid carefully and await a day when the augeries are more auspicious. Certainly the problems of judge-made notions of equity versus the arbitrator's sense of fair play are in the same category.

More, at this stage, is to be gained by looking at the problem from the *grievance* theory perspective. The question then becomes whether all claims are susceptible to arbitration? In this connection we are aware that it is only natural for proponents of "panaceas, electuaries and nostrums" to overstate their case. Indeed, clear thinking is always needed "because arbitration has been so indiscriminately accepted as an infallible cure for all commercial disputes."[19]

It is more reasonable to assume that arbitration is better suited to a dispute which is grounded not so much in the violation of the letter of some rule or some law per se, as in the more indistinct area of personal grievance and discord, i.e., where application of the letter of the law does not provide a meaningful solution. A secondary area would be one where there is no adequate remedy at law or in equity. An example of the latter is the problem of corporate dissolution as the only statutory way out of an impasse.[20] The ideal arbitration setting occurs when the arbitrator has before him and has the power to consider, the facts, the atmosphere of which the claim is a part, and the ultimate impact which his award will have on the day to day continuity of business activities. In such a setting arbitration performs a socially useful function.

C—Decision making is in the hands of non-professional judges; the decision is the end-product of the application of pragmatic concepts

18. Kelsen, What Is Justice, Collected Essays, U. of Cal. Press (1957).
19. Phillips, a General Introduction To Symposium on Arbitration, 83 U. of Penn. L. Rev. page 119 (1934).
20. Concerning arbitration of problems in the close corporation, see F. Hodge O'Neal, Close Corporations, Vol. II (1959), pp. 180-222; Hornstein, Corporation Law and Practice Vol. I (1959) pp. 230-234.

of fairness as employed and observed in myriad daily transactions by the business and professional communities.

Pound maintains:

> "The history of civilization shows a movement towards a systematic application of politically organized society by trained magistrates according to a scientifically organized body of authoritative guides and grounds of decisions developed and applied by authoritative technique."[21]

And, he continues

> ". . . even the highest development of morals and a high sense of justice are not of themselves equal to satisfactory solution of many, indeed very many, practical problems of adjusting violations and ordering conduct where harmonizing and even compromising of conflicting and overlapping human desires and demands has to be arrived at by experience developed by reason and formulated in authoritative principles and rules. Men are content to abide subjection of their claims to these principles when it is known that they will be applied uniformly and systematically to all alike."[22]

Pound is wary of caprice, whim and anarchy. It is interesting to note that some substantive law problems which arise in connection with international treaties and uniform laws revolve around the question of private law and anarchy. But this concern is not relevant when arbitration is viewed through the business man's eyes for freedom of activity is uppermost in his mind.

We know that arbitration is not practiced by "trained magistrates" and, as we have already noted, there do not appear to be any scientific guides to decision making, i.e., decision making without law making. But if it is an adjudicative manifestation of what might be called the oral law of business and its guides are the pragmatics of the market place, precision and uniformity may not be of such import. Indeed, since each decision is ad hoc, such considerations may be irrelevant. The essence of this concept is that the claim brought to arbitration is not a dispute qua dispute which requires the full panoply of legal machinery but is considered an integral and typical part

21. Pound, Why Law? in The Task of Law, p. 15.
22. *Ibid*, p. 16.

of business activity; a problem dealt with in the ordinary course of business.

The role of trained magistrates is filled by an experienced and expert panel. This idea is critical, for the parties seeking arbitration may rest more comfortably with the award when they feel that the "Judge" understood and appreciated their business positions.

There has been a notion prevalent throughout history that the universal principles of justice "are known in detail and in their applications to any upright man of common sense, and certainly to the wise and just magistrate. Hence an ideal of rude natural justice dispensed without rule by a jury or by a plain man has often been popular."[23] If there is no adequate remedy at law or in equity does it not follow that an expert who is also a "plain man" is properly endowed to decide a dispute between "plain men"?

D—the parties selecting arbitration did not want to go to the courts in the event of a dispute, i.e., within their contemplation the hazards of the ordinary courts outweighed the advantages afforded by that forum.

No attempt will be made to derive a pleasure-pain calculus which will illustrate the selection of arbitration in lieu of the courts. Measuring the sums of such satisfaction would be, with apologies to Thurber, akin to measuring the distance between the horns of a dilemma. But what is within the realm of possibility is the isolation of hazards which the businessman contemplates when he thinks of the courts. For example, perhaps one of the contemplated hazards concerns the very manner in which the ordinary courts go about finding and applying the law. If the businessman conceives of certain disputes as a circumstance attendant upon doing business, is it not reasonable to expect that the solution he seeks is not one of ultimate legal conclusions but of "good business," for all parties?

The use of the future disputes clause is conceptually defined as an exercise of the will of the parties (consent). Government's role in relation to that will is the responsibility of ensuring, "not only that promises involving social relations shall be kept but also that decisions of disputes by non-judicial bodies shall be binding upon parties who have appropriately consented thereto."[24] Some authorities find the flaw in the consensual concept in the idea that the clause is an

23. *Ibid*, p. 14.
24. Carlston, Theory of the Arbitration Process, cited supra note 5.

agreement, when in fact it is a means.[25] Under that approach the existence of the clause presupposes the absence of agreement and addresses itself to the post-contractual results of a failure to fill the gaps at the time of contract. While this analysis may be of interest there are more fruitful ways of analyzing the problem.

Emphasis should not be centered upon the illusory sacredness of the will of the parties. When tested in the ordinary courts that will succumbs quite readily to the pressure of local public policy. Attention should be focused more on the definition of hazards, be they clearly or vaguely sensed, and less upon the legal effect or force of choosing arbitration.

Consider the present posture of international commercial arbitration. It is fervently hoped that many governments will adopt uniform laws enforcing arbitration agreements and awards. As has been previously mentioned this is a salutary development, one which would complement handsomely the decision by the businessman to select arbitration. Admittedly, some increase in the frequency of arbitration would be attributable to such enactments. But it is not at all clear whether these enactments per se stimulate any appreciable increase in arbitrations. Exquisite refinements of arbitration statutes are of little consequence if the businessman is not convinced of the need for and of the efficacy of the arbitral process. Surely the enactment of domestic legislation has had little impact upon the use of arbitration. Uniform laws can only operate to ease arbitral functioning. They are not an end in themselves, nor are they a convincing reason for using that method of dispute settlement.

Rudolf von Jehring's admonition that "a legal proposition without legal compulsion behind it is a contradiction in itself; a fire that burns not, a light that shines not"[26] is neatly put. But in the case of arbitration it sets the cart before the horse. First comes ascertainment of the contemplated hazards which compel rejection of the ordinary courts. Once determined the enforcement of agreements to arbitrate would add simply another dimension to the system.

The problem of accessibility of forums is similar. Assuming that a forum is accessible what does the party do once it is there? If there is no cogent need for its usage will it be utilized just because it is accessible? After all, in most disputes the ordinary courts *are* accessible. But do all claims lend themselves equally either to the ordinary courts

25. *Ibid.*
26. In Pound, Why Law? in The Task of Law, p. 31.

or to arbitration? Surely there has been no urgent expression of pressing need on the part of the international business community for an arbitration forum. However, it may very well be that under present conditions the costs of litigation in a foreign land, regardless of what forum is resorted to, are prohibitive. The solution is either sought in another way or considered a cost of doing business.

E—Arbitration has predated the common law; its existence, through a long history, is prima facie evidence that it meets a need!

Arbitration is "a custom hallowed by centuries of social usage reaching even into recesses of Greek Mythology."[27] Wyndham Bewes, in his *Romance of the Law Merchant* (1923) describes an achievement in the field of economic law which has a bearing.

> "Merchants travelling to fairs and markets during the late 15th century could be reasonably sure to find everywhere courts administering a legal system of roughly similar character, courts freely accessible to nationals and non-nationals, residents and non-residents alike and courts capable of enforcing on the spot judgments that were rendered by them. Arbitral tribunals of today are far from this level of achievement, notwithstanding the fact that the need for such achievement is incomparably greater than it was 400 years ago."[28]

Arbitration has coexisted with other legal systems and has been utilized to perform a socially desirable activity, to fulfill a need for adjudication of disputes which were not fully resolved by resort to other methods. The pressing need today is for a re-evaluation of the optimum arbitral situations within the context of our present economy.

Unfortunately some over-zealous advocates of arbitration have occupied their energies with reactions to the supremacy of the law. This phenomenon manifests itself in an interesting polarity. At one extreme there is universalism tinged with a manifest destiny which tends to portray arbitration as a method which transcends all other forums. At the other end is the movement to gain arbitration's acceptibility within the ordinary courts, whether the method be through case law or statutes.

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27. Carlston, Theory of Arbitration, cited supra note 5.
28. Cohn, Economic Integration and International Commercial Arbitration, in Domke (ed.), International Trade Arbitration p. 21 (1958).

The invalidity of any universal dialetic is patent. The courting of the courts has tended to obfuscate rather than clarify the issues. It has contributed to an unwanted result—the imposition of courtroom techniques with few positive aspects to offset it.

> "[This imposition leads] courts and attorneys to apply the familiar norms and standards of the courtroom to a proceeding which is basically dissimilar to a legal action and designed to further a different end. The parties to the arbitration oftentimes find themselves in the presence of attorneys who utilize in the arbitration proceeding all the subtleties and technicalities so persuasive in the courtroom. . . . Another result of such confusion is the creation of animosity between the business man and the bar. The attorney may not infrequently find himself regarded as an obstructionist and unwelcome intruder at the arbitration proceeding."[29]

It is common knowledge that the rules of evidence are not applied strictly and that there is no burden of proof in arbitration. Nevertheless, we are also aware, as Pound reminds us, that a fundamental tenet of the common law is that litigation is contentious. This atmosphere has in many instances become part of the arbitration process; indeed some advise first-time arbitrators to become adjusted to the adversary proceeding. But is it so clear that contention belongs in an arbitration if the rules of evidence are relaxed and the burden of proof is not relevant? It may very well be that "contention" is one of the hazards that the businessman seeks to avoid when he rejects the ordinary courts and resorts to arbitration.

Recourse to arbitration's long history may serve to aright the derailment which arbitration suffered when it collided with the common law. Arbitration has become the handmaiden of the courts. It must resume its rightful place as the instrument of the parties.

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29. Abrams, Arbitration, Courts and Corporate Problems, cited supra note 9.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

FRAUDULENT INDUCEMENT OF THE CONTRACT IS A PROPER SUBJECT FOR ARBITRATION UNDER A CLAUSE providing for arbitration of "all claims, disputes, differences and controversies arising under or in connection with" the agreement. The court held it of "such breadth as to compel a finding that the parties intended to arbitrate" also the question of fraudulent inducement of the contract. *M. W. Kellogg Co. v. Monsanto Chemical Co.,* 9 App. Div. 2d 744.

UNCONTRADICTED MOTOR VEHICLE REPORT BY AUTO OWNER STATING THAT HIS VEHICLE WAS DRIVEN BY AN OPERATOR WITHOUT HIS PERMISSION CONSTITUTED SUFFICIENT EVIDENCE OF THAT FACT SO AS TO COMPLY WITH CONDITION PRECEDENT TO ARBITRATION. A motion of the insurance company for a stay of arbitration was denied, the court saying: ". . . the duly filed accident report, subscribed by the owner, stating, without contradiction, that the owner did not permit the operator to drive the automobile, proven by a certified, photostatic copy prepared by the Bureau of Motor Vehicles . . . is compliance with the condition precedent to arbitration in this case." *Lowe v. Ocean Accident and Guarantee Corp., Ltd.,* 193 N.Y.S. 2d 361 (Catalano, J.).

ARBITRATION UNDER A SUBMISSION OF PARTNERSHIP DISPUTE ON SALE OF ASSETS MUST BE STAYED WHERE COMPUTATION OF ASSETS TO BE SOLD NECESSARILY INVOLVES AN INFANT'S INTESTATE SHARE AND CREDITORS' RIGHTS IN A DECEASED'S ESTATE WHICH MAY NOT BE SUBJECT OF AN ARBITRATION. *Matter of Kabinoff,* 19 Misc. 2d 15 (McDonald, J.).

ONLY THE UNION, AND NOT AN INDIVIDUAL MEMBER THEREOF, MAY DEMAND ARBITRATION. An employee who had taken a year's maternity leave of absence from a firm which had employed her for twenty years, notified the company of her intention to return nine days later than the date fixed for such notice in the collective bargaining agreement. The grievance committee agreed with the company decision not to re-employ petitioner. She sought to compel arbitration, claiming bias on the part of the grievance committee's chairman. Said the court: "If the union has inadequately or unfairly represented petitioner she may have a remedy against the union," but arbitration may only be compelled by the union. *Calka v. Tobin Packing Co.*, 9 App. Div. 2d 820.

COURT WILL STAY SUBCONTRACTOR FROM PROCEEDING "EXCEPT THROUGH ARBITRATION" where the effect of the order would be to vacate a notice of a mechanic's lien filed by a subcontractor against his general contractor. The court noted, however, "that section 35 of the Lien Law expressly provides that the filing of a notice of lien shall not be a waiver of any right of arbitration." *R.G.R. Construction Corp. v. Robert J. Harder, Inc.*, 19 Misc. 2d 920 (Pette, J.).

FORMER EMPLOYEES OF INDEPENDENT CONTRACTOR CANNOT ENFORCE ARBITRATION OF DISPUTE WHICH AROSE UNDER A SUPERSEDED AGREEMENT. The collective bargaining contract provided that wholesalers delivering only one newspaper would be deemed employees of the publisher. The wholesaler's books and business associations showed him to be an independent contractor. Therefore the "present practice" of the wholesaler superseded the agreement between the union and the association, and arbitration was denied the employees of the wholesaler. *Publishers' Association of New York City v. Newspaper and Mail Deliverers' Union of New York & Vicinity*, 193 N.Y.S. 2d 111.

DISCHARGED EMPLOYEE HAS NO ACTION AT LAW FOR WAGES BASED ON EMPLOYMENT CONTRACT WHEN UNION WITHDREW FROM ARBITRATION, THUS MAKING THE DECISION AGAINST EMPLOYEE IN GRIEVANCE PROCEDURE FINAL. Said the court: "We do not pass on what remedies, if any, plaintiff may have directly to review the arbitration proceeding, or to compel further proceedings." *Willow v. New York State Electric and Gas Corp.*, 194 N.Y.S. 2d 572.

MOTION TO STAY PROCEEDINGS UNTIL THE CONCLUSION OF ARBITRATION DENIED WHERE SUBCONTRACTOR WAS NOT A PARTY TO THE ARBITRATION AND THEREFORE WAS NOT BOUND BY THE AWARD. Moreover, he had a right of action under the lien law. *J. Marks & Bro., Inc. v. Seventy-Second Street Properties, Inc.*, N.Y.L.J., Jan. 14, 1960, p. 12 (Chimera, J.).

II. THE ARBITRABLE ISSUE

CONTRACT PROVIDING FOR ARBITRATION OF "ALL QUESTIONS THAT MAY ARISE UNDER THE CONTRACT AND IN THE PERFORMANCE OF THE WORK THEREUNDER" INCLUDES ARBITRATION OF AN ALLEGED BREACH AND REPUDIATION BY ONE PARTY. "Suits for breach of contract raise issues concerning the mutual rights and obligations of the parties to the contract. These issues must be resolved by reference to and interpretation of the provisions of the contract, and are comprehended within the scope of the instant arbitration provision. To allow plaintiff to conclusorily frame the issue in terms of breach and repudiation, and thereby avoid arbitration, would render the instant arbitration agreement meaningless." Though the issue of breach or no breach was within the scope of the arbitration agreement, the court held that assessment of damages was not. *De Lillo Construction Co. v. Lizza & Sons, Inc.*, 7 N.Y. 2d 102 (Froessel, J.).

GENERAL RELEASE PURPORTING TO TERMINATE AN AGREEMENT CONTAINING AN ARBITRATION CLAUSE RAISES ISSUES FOR ARBITRATORS TO DECIDE AND NOT FOR THE COURT. In affirming the lower court's decision (digested in *Arb. J.* 1959, p. 204), it was said: "The rule would now seem to be settled that subsequent acts or documents purporting or claimed to terminate an agreement containing a broad arbitration clause, if in dispute, raise issues for the arbitrators and not for the court." *Stein-Tex, Inc. v. Ide Mfg. Co., Ltd.*, 9 App. Div. 2d 288, 193 N.Y.S. 2d 719 (First Dept.).

CLAIM OF LOCKOUT REPRESENTS ARBITRABLE ISSUE WHEN COLLECTIVE BARGAINING AGREEMENT FORBIDS LOCKOUT "FOR ANY REASON DURING THE TERM" OF THE CONTRACT. Laying-off of bus drivers and hiring others from another bus company presents a question involving "interpretation of this agreement," namely whether the occurrence was a lockout or a mere change in the performance of the bus company's operation. *Amal. Ass'n of Street, Electric Railway and Motor Coach Employees of America (AFL-CIO) v. Henrickson Bus Co.*, 19 Misc. 2d 1079, 193 N.Y.S. 2d 682 (Crisona, J.).

DISPUTE OVER DISCHARGE OF EMPLOYEE AS A SECURITY RISK IS NOT ARBITRABLE, WHEN POWER OF EMPLOYER WAS UNLIMITED BY THE COLLECTIVE AGREEMENT EXCEPT FOR DISCRIMINATION BECAUSE OF UNION MEMBERSHIP. Said the court: "Each dispute must be evaluated in accordance with the particular provisions of the contract involved. Within the four corners of the particular contract must be found the scope of arbitrable disputes . . ." Here, the collective bargaining agreement did not limit the employer's right to discharge an employee "for any reason unless the employer, by such discharge, discriminates against him because of union membership. No such claim is made here." *Priest v. General Electric Co.*, 178 F. Supp. 514 (Brennan, Ch. J.).

NO BONA FIDE DISPUTE WAS PRESENTED AND ARBITRATION WAS THEREFORE NOT COMPELLED WHERE CONSTRUCTION CONTRACT PROVIDED FOR "EXTRA WORK" ONLY WHERE ROCKS WERE OVER ONE CUBIC YARD IN SIZE AND COULD NOT BE DISLODGED WITHOUT BLASTING AND DRILLING, AND WHERE CONTRACTOR DID NOT CLAIM THAT ROCK REMOVAL INVOLVED THESE CONDITIONS. *George F. Driscoll Co. v. New York City Housing Authority,* 193 N.Y.S. 2d 843.

A GRIEVANCE DOES NOT LOSE THE QUALITY OF ARBITRABILITY MERELY BECAUSE THE ACTION COMPLAINED OF MAY ALSO BE AN UNFAIR LABOR PRACTICE UNDER THE TAFT-HARTLEY ACT. An award for payment of Saturday wages and time lost by a shutdown of the plant was confirmed by California State Courts, though an unfair labor practice was also involved in the violation of lockout provisions in the collective bargaining agreement (see *Arb. J.* 1959 p. 219). An action by the employer in the federal court to enjoin the enforcement of the award was dismissed, the court relying on the *Cameron* case, 257 F. 2d 467 (digested in *Arb. J.*, 1958 p. 171), where it was said that a "suit to compel employer to arbitrate a controversy on discharge for unlawful strike is within jurisdiction of Sec. 301 Taft-Hartley Act, even though discharge may involve unfair labor practice cognizable by NLRB." *Ryan Aeronautical Co. v. Int'l Union, United Automobile, Aircraft & Agricultural Implement Workers of America, Local* 506, 179 F. Supp. 1 (Kunzel, D. J.).

SUBSTANTIVE ARBITRABILITY OF A DISCHARGE, I.E., "THAT THE DISPUTE IS THE TYPE THAT THE PARTIES HAD AGREED TO ARBITRATE," IS FOR THE COURTS TO DETERMINE WHEN COLLECTIVE BARGAINING AGREEMENT GAVE NO INDICATION OF THE PARTIES' INTENTION TO DETERMINE THE ISSUE OF ARBITRABILITY. *Brass & Copper Workers Federal Labor Union, No.* 19322, *AFL-CIO v. American Brass Co.,* 272 F. 2d 849 (Hastings, Ch. J.).

CONTRACT AGREEMENTS CONCERNING EXPANSION OF "WELFARE BENEFITS" DOES NOT INCLUDE ARBITRATION OF PENSION AND RETIREMENT RIGHTS. The court thought that from the testimony of the experts it was clear that "prevailing practice in collective bargaining agreements treats the subject of 'pensions' as separate and distinct from the area covered by the term 'welfare benefits' and that the latter did not customarily include the former." *Bellamy v. League of N.Y. Theatres, Inc.,* N.Y.L.J., Jan. 7, 1960, p. 11 (McGivern, J.).

A DISPUTE OVER AMOUNT OF EMPLOYER CONTRIBUTIONS TO WELFARE FUNDS HELD ARBITRABLE when union claimed that employer concealed amounts through the use of two sets of books, which the employer denied. Said the court: "Whether . . . the correct amount due under the terms of the agreement has been paid is an arbitrable issue and entirely within the competence of the [arbitrator]." *Greenstein v. National Skirt & Sportwear Ass'n,* 178 F. Supp. 681 (S.D. N.Y., Weinfeld, J.).

DISPUTE OVER MEANING OF THE WORD "TENDER" HELD NOT TO BE ARBITRABLE. Stockholder's agreement provided in the event that one stockholder should tender his stock for sale he must resign as a director and would be discharged as an employee of the corporation. Said the court: "The only logical leal meaning of the word 'tender' as used in these agreements, can be construed to mean tender and acceptance . . . There is no such dispute existing in this regard which would justify permitting an arbitration board to pass upon that question." ***Hausner v. Hopewell Products,*** 19 Misc. 2d 818 (Di Giovanna, J.).

DISPUTE OVER CONDITION OR QUALITY OF GOODS IS ARBITRABLE WHERE CONTRACT SPECIFICALLY PROVIDES FOR ARBITRATION OF SUCH CONTROVERSIES. Buyer claimed misbranding of certain fabrics and that this act being unlawful would taint the entire agreement with illegality so that it would be "beyond the reach of the arbitration clause." The court rejected this argument by saying: "If there was misbranding . . . there is no reason why the arbitrator may not determine what amends must be made." ***Rosenbaum-Grinell, Inc. v. Strong, Hewat & Co.,*** N.Y.L.J., Jan. 13, 1960, p. 12 (Hofstadter, J.).

WHETHER A RETIRING EMPLOYEE IS ENTITLED TO BOTH SEVERANCE PAY AND PENSION BENEFITS WAS HELD ARBITRABLE under a collective bargaining agreement that provided pensions only for those employees who were not participants in "retirement or similar benefits." The court held that whether the Pension Committee was correct in its determination that severance pay at retirement fell within the category of "similar benefits" was a matter for the arbitrators to decide. ***Saks & Co. v. Saks Fifth Avenue Women's Shoe Salespeople Committee,*** 9 App. Div. 2d 325 (First Dept., Breitel, J.P.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

AFFIRMATIVE DEFENSE OF FAILURE TO MAKE TIMELY DEMAND FOR ARBITRATION IS STRUCK FROM THIRD PARTY COMPLAINT IN FEDERAL COURT BECAUSE SUCH DEFENSE WOULD NOT BE ALLOWED UNDER APPLICABLE STATE LAW. In a New York contractor's suit against a nonresident surety corporation on the subcontractor's performance bond, the corporation filed a third party complaint against the subcontractor, who pleaded as an affirmative defense the contractor's failure to make a timely demand for arbitration. The contractor's motion to strike the affirmative defense was granted because sec. 1451 of the New York Civil Practice Act provides a third party defendant with an exclusive remedy of obtaining a stay of proceeding until arbitration be had and "the defendant in such an action must use those means or none at all." ***James King & Son, Inc. v. Indemnity Insurance Co., of North America,*** 178 F. Supp. 146 (S.D. N.Y., Ryan, Ch. J.).

NEW YORK COURT REFUSED TO ENJOIN LOUISIANA LIEN PROCEEDING PENDING DETERMINATION OF ARBITRATION OF DISPUTE ON CONTIGUOUS OIL INTERESTS. The Court held that the objection of untimely filing of the lien rather than challenging the merit of the claims underlying the lien was not sufficient to grant such a restraint. *Loutex Gas & Oil Corp. v. Star Pipe Line Co.*, 194 N.Y.S. 2d 983 (Markowitz, J.).

WHEN CONTRACT BETWEEN GENERAL CONTRACTOR AND SUBCONTRACTOR MAKES DECISION OF ARBITRATORS A "CONDITION PRECEDENT TO ANY RIGHT OF LEGAL ACTION," court proceeding would be stayed until arbitration be had to determine the issues raised by the pleadings. *United States v. Al-Con Development Corp.*, 271 F. 2d 904 (Fourth Cir., Boreman, J.).

MERITS OF CONTROVERSY CANNOT BE CONSIDERED ON MOTION TO STAY ARBITRATION. Only three questions are for the court: Is there a contract to arbitrate? Is there in fact a dispute? If there a refusal to arbitrate? Every other issue in the proceedings, whether of fact or law and whether raised by denial or defense, is for the arbitrator. *Russeks Fifth Avenue v. Wagner*, N.Y.L.J., Jan. 8, 1960, p. 12 (Martuscello, J.).

ORDER DENYING A STAY OF PROCEEDINGS UNTIL ARBITRATION BE HAD BECOMES ACADEMIC WHERE THE ARBITRATION AWARD HAS BEEN RENDERED. The Seventh Circuit did not determine whether the order denying the union's motion to stay pending arbitration constituted a final order and was therefore appealable, since "the arbitration for which defendants demanded a stay has been accomplished . . . There is no longer pending any arbitration for which a stay could be granted." *American Smelting & Refining Co. v. United Steelworkers*, 271 F. 2d 802 (Seventh Cir., Duffy, J.).

UNDER COLLECTIVE BARGAINING AGREEMENT GIVING EMPLOYER RIGHT TO LAY OFF EMPLOYEES IN GOOD FAITH AND IN THE EXERCISE OF SOUND BUSINESS JUDGMENT, ARBITRATION WILL BE STAYED WHEN UNION IN ITS DEMAND FOR ARBITRATION GAVE NO FACTS RAISING ISSUE AS TO EMPLOYER'S GOOD FAITH OR BUSINESS JUDGMENT. *Application of Willoughby Realty & Management Co.*, 9 App. Div., 2d 889, 193 N.Y.S. 2d 837 (First Dept.).

NON-OBSERVANCE OF PROCEDURAL REQUIREMENTS, SUCH AS THE TIME LIMIT OF TEN DAYS FOR REQUESTING ARBITRATION OF DISCHARGE, IS FATAL WHEN UNION PROCEEDED THIRTEEN DAYS AFTER RECEIPT OF EMPLOYER'S FINAL ANSWER. An action to compel arbitration under Sec. 301 Taft-Hartley Act was therefore dismissed. *Brass & Copper Workers Federal Labor Union No.* 19322, *AFL-CIO v. American Brass Co.*, 272 F. 2d 849 (Hastings, Ch. J.).

PROCEDURAL REQUIREMENTS OF COLLECTIVE BARGAINING AGREEMENT MUST BE COMPLIED WITH BEFORE UNION IS ENTITLED TO ARBITRATION. The union's contention that the requirement of written notice of arbitration had fallen into disuse in the past was refuted by the court. "Whatever may have been the manner of disposition of other grievances in the past, it appears that in this case the company insisted upon adherence to the procedural steps precedent to arbitration specified in the agreement. As the union invokes the court's aid by virtue of and under the agreement, not having complied with its terms, it is not entitled to the relief here requested [to compel arbitration]." ***Local 459, Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. Remington Rand, Div. of Sperry Rand Corp.,*** 19 Misc. 2d 829 (Loreto, J.).

IV. THE ARBITRATOR

AN ARBITRATOR CANNOT BE REMOVED FOR ALLEGED MISCONDUCT UNTIL AFTER AN AWARD HAS BEEN MADE. Relying on 6 Williston, Contracts, rev. ed. sect. 1923A, p. 5383, to the effect that the New York Arbitration Statute contains "no provision for vacating the office of arbitrator in the event he is shown to be biased or prejudiced during the proceeding," the court denied as premature the motion to direct the trade association involved to designate a new panel of arbitrators. The court, on reargument, distinguished *Gaer Bros., Inc. v. Mott,* 144 Conn. 303 (digested in *Arb. J.,* 1957 p. 171), which had allowed such challenge, since there is a distinction, "legislative and judicial, between a special proceeding under the arbitration statute and a plenary action for an injunction under the common law." *Gray v. I. Morgenstein, Inc.,* N.Y.L.J., Jan. 25, 1960, p. 13; Jan. 28, 1960, p. 13 (Levy, J.).

ABSENCE OF AN ARBITRATOR FROM ONE OF THE HEARINGS, ALTHOUGH WITH WRITTEN STIPULATION OF THE PARTIES, WILL NEVERTHELESS INVALIDATE THE AWARD BECAUSE NEW YORK STATUTE REQUIRES THE PRESENCE OF ALL THE ARBITRATORS AT ALL THE HEARINGS. *Matter of Cohen,* 195 N.Y.S. 2d 477 (Conlon, J.); pending on appeal.

V. THE PROCEEDINGS

FAILURE TO DEMAND ATTORNEY AFTER DISMISSING ONE COUNSEL AMOUNTS TO A WAIVER OF THE RIGHT TO COUNSEL. The employer, having appeared by counsel in the early part of the arbitration proceedings, discharged his attorney and elected to appear at a later hearing without any legal representation. The court held that the party deprived itself of the right to counsel and could not complain about this after the award was rendered. *Spector v. Morry Hats,* N.Y.L.J., Feb. 4, 1960, p. 12 (Lupiano, J.).

COURT RULING THAT ARBITRATION WAS NOT DEMANDED WITHIN A REASONABLE TIME AND THEREFORE WAIVED, WILL NOT BE SET ASIDE BY APPELLATE COURT WHERE EVIDENCE OFFERED ON APPEAL WAS NOT SEEN BY LOWER COURT. In a court action of a contractor to foreclose a mechanic's lien, the owner moved for an order submitting the issues to arbitration, which the court denied since the demand was not made within a reasonable time as required by the contract. On appeal, much material which had not been seen by the lower court was introduced. The court dismissed the appeal for insufficiency of the record and did not decide on the merits inasmuch as the original decision might have been different if the new evidence had been seen by the lower court. *Hering Realty Co. v. General Construction Co.,* 272 F. 2d 371 (Fourth Cir., Soper, J.).

SERVICE OF NOTICE OF INTENTION TO ARBITRATE ON EMPLOYERS ASSOCIATION IS VALID "NOTICE" WHEN THE ASSOCIATION WAS CONTRACTUALLY DESIGNATED BY THE PARTY TO THE ARBITRATION AS ITS AGENT FOR SERVICE OF PROCESS. This was "not an uncommon procedure," the court said. *Minkoff v. Gray Fox Sportswear Corp.,* N.Y.L.J., Jan. 22, 1960, p. 13 (Levy, J.).

PARTICIPATION IN ARBITRATION PROCEEDINGS WITH FULL KNOWLEDGE OF METHOD OF SELECTION OF ARBITRATORS WITHOUT ANY OBJECTION THERETO IS A BAR TO LATER VACATING THE AWARD BECAUSE OF ALLEGED RELATIONSHIP OF THE ARBITRATORS. *L. A. Slesinger, Inc. v. Calvine Mills,* 194 N.Y.S. 2d 1021 (Markowitz, J.).

BANDLEADER WHO WAS GIVEN NOTICE OF INITIATION OF PROCEEDINGS UNDER THE BYLAWS OF THE AMERICAN FEDERATION OF MUSICIANS AND WHO SUBMITTED REBUTTAL AND SURREBUTTAL TO CLAIM, COULD NOT LATER CONTEND THAT HE WAS UNAWARE THAT THE DISPUTE WAS BEING ARBITRATED. A motion to vacate the award was therefore denied. *Digeorgia v. American Federation of Musicians,* 17 Misc. 2d 343, 186 N.Y.S. 2d 517 (Steuer, J.).

VI. THE AWARD

MISTAKE BY PARTY ON APPLICABLE LAW, NAMELY THAT ARBITRATION CLAUSE WAS UNENFORCEABLE UNDER FLORIDA LAW, HELD NOT SUFFICIENT TO VACATE DEFAULT ARBITRATION AWARD. Said the court: "While sufficient has been shown here to permit the court to open a default judgment . . . there is no judgment or order of the court [in this case] over which it has control. Article 84 of the Civil Practice Act provides the exclusive manner by which an award may be . . . vacated." *Couture Fabrics, Ltd. v. Phyllis Dee, Inc.,* 194 N.Y.S. 2d 1001 (Markowitz, J.).

WHERE SPECIFIC REFERENCE WAS MADE IN ARBITRATION HEARINGS TO MECHANIC'S LIENS, AWARD CONTAINED NO INDICATION AS TO WHETHER PART OF TOTAL SUM AWARDED WAS TO BE USED TO SATISFY LIENS OR IF RESPONDENT TOOK SUCH SUM FREE OF ANY SUCH OBLIGATION. PROCEEDINGS WERE THEREFORE REMITTED TO THE SAME ARBITRATORS FOR THE SOLE PURPOSE OF INDICATING A DISPOSITION OF THAT ISSUE. *Ritchie Building Co. v. Rosenthal,* 193 N.Y.S. 2d 483 (App. Div., First Dept.).

MARITIME AWARD MAY BE CONFIRMED BY FEDERAL COURT THOUGH PARTY MOVED IN STATE COURT TO VACATE IT. In denying a motion to vacate the award the N.Y. State Court (Special Term) said: "The owner in effect would ask this court to review the decision of the arbitrators and substitute its own. This the court cannot do." Previously, the charterer had moved in the federal court for confirmation of the award, in which court he had originally applied for an order compelling arbitration, which petition was never judicially acted upon. The federal court stayed action pending determination of the New York Supreme Court, stating that "there is no doubt that a State Court has jurisdiction over arbitration agreements in maritime contracts under the 'saving to suitors' clause of the Judicial Code (28 U.S.C. § 1333 (1))." *Cocotos Steamship of Panama, S.A. v. Hugo Neu Corp.,* 193 N.Y.S. 2d 321 (Epstein, J.); 178 F. Supp. 491 (S.D. N.Y., Cashin, J.).

COURTS HAVE NO POWER TO REVISE ERRORS OF FACT OR LAW MADE BY THE ARBITRATORS OR TO RENDER A DECISION DE NOVO ON THE MERITS. *Florida Molasses Co. v. First National Oil Corp.,* N.Y.L.J., Jan. 15, 1960, p. 16 (Latham, J.).

MERE NON-ACCEPTANCE BY ARBITRATORS, IN ACTION FOR UNLIQUIDATED SUM, OF THE PARTIES' FIGURES, DOES NOT AMOUNT TO A SUFFICIENT MISCALCULATION TO JUSTIFY COURT MODIFICATION OR CORRECTION OF THE AWARD. This controversy was between a stockbroker and one of its customers. Each party produced an accountant before the arbitrators and according to one accountant the customer suffered a loss, while the other showed that there was a net increase. The arbitrators awarded an amount less than that sued for but different from that shown by the broker. "The award may not be disturbed for error of fact or law . . . except on a ground specified by statute, and no such grounds appears here." *Reynolds & Co. v. Carter,* N.Y.L.J., Jan. 7, 1960, p. 10 (Hofstadter, J.).

ENTRY OF JUDGMENT UPON AN AWARD CANNOT BE STAYED UNTIL DETERMINATION BY THE COURT IN A FORECLOSURE LIEN ACTION. Said the court: "The arbitration proceeding [would be] valueless, when in fact the amount found due to plaintiff by the arbitrators is conclusive in any action to foreclose the lien." *Arum Carpentry v. Sesi,* N.Y.L.J., Feb. 9, 1960, p. 12 (Gavagan, J.).